

1 UNITED STATES BANKRUPTCY COURT

2 EASTERN DISTRICT OF NEW YORK

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4 In the Matter of:

5

6 DOWLING COLLEGE, Case No. 16-75545-reg

7 Debtor.

8 - - - - - x

9 ZAIKOWSKI,

10 Plaintiff,

11 v. Adv. Case No. 16-08178-reg

12 DOWLING COLLEGE,

13 Defendant.

14 - - - - - x

15

16 U.S. Bankruptcy Court

17 Long Island Federal Courthouse

18 Central Islip, NY

19

20 May 22, 2017

21 1:58 PM

22

23 B E F O R E :

24 HON ROBERT E. GROSSMAN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: [74] ADJ Order Scheduling Initial Case
2 Management Conference.

3
4 Hearing re: [31] Final ADJ Order to Schedule Emergency
5 Hearing on [9] Motion for Authority to Obtain credit Under
6 Section 364(b), Rule 4000(c) or (d) to Obtain Post-Petition
7 Secured, Superpriority Financing Pursuant to 11 U.S.C.
8 Sections 105, 361, 362, 363, and 364 and (B) to Utilize Cash
9 Collateral Pursuant to 11 U.S.C. Section 363; Adequate
10 Protection to Pre-Petition Secured Creditors Pursuant to 11
11 U.S.C. Sections 361, 362, 363, and 364 by Joseph Charles
12 Corneau on behalf of Dowling College.

13
14 Hearing re: [314] Interim Application for Compensation by
15 SilvermanAcampora LLP as Counsel to the Official Committee
16 of Unsecured Creditors for Fees of \$205,992.50 Expenses:
17 \$242.35 by Ronald J. Friedman on behalf of Official
18 Committee of Unsecured Creditors.

19
20 Hearing re: [307] Interim Application for Compensation by
21 Klestadt Winters Jureller Southard & Stevens, LLP as General
22 Bankruptcy Counsel to the Debtor and Debtor in Possession
23 for Fees of \$522,896.25 Expenses: \$9,239.82 by Lauren
24 Catherine Kiss on behalf of Dowling College.

25

1 Hearing re: [308] Interim Application for Compensation by
2 Smith & Downey, P.A. as Special Counsel to the Debtor and
3 Debtor in Possession for Fees of \$8,516.25 Expenses: \$0.00
4 by Lauren Catherine Kiss on behalf of Dowling College.

5
6 Hearing re: [309] Interim Application for Compensation by
7 Eichen & DiMeglio, P.C. as Accountants to the Debtor and
8 Debtor in Possession for Fees of \$36,157.00 Expenses \$541.22
9 by Lauren Catherine Kiss on behalf of Dowling College.

10
11 Hearing re: [310] Interim Application for Compensation by
12 FPM Group, LTD. as Consultants to the Debtor and Debtor in
13 Possession for Fees of \$28,843.27 Expenses: \$12,846.12 by
14 Lauren Catherine Kiss on behalf of Dowling College.

15
16 Hearing re: [312] Motion to Authorize and Approve Pursuant
17 to Fed. R. Bankr. P. 9019 a Settlement By and Between the
18 Debtor, International Union of Operating Engineers Local 30,
19 Gary Bishop and Justino Reyes by Lauren Catherine Kiss on
20 behalf of Dowling College.

21
22 Hearing re: [313] Application to Employ and Approve the
23 retention of Farrell Fritz, P.C., as Special Counsel to the
24 Debtor, Nunc Pro Tunc to March 28, 2017 by Lauren Catherine
25 Kiss on behalf of Dowling College.

1 Hearing re: [316] Motion to Authorize and Approve
2 Procedures for the Disposition of the Debtor's Records by
3 Lauren Catherine Kiss on behalf of Dowling College.

4
5 Hearing re: [317] Motion to Sell Property of the Estate
6 Free and Clear of Liens under 11 U.S.C. 363(f); Approving
7 Procedures for the Sale of Certain Assets Free and Clear of
8 Liens, Claims and Encumbrances and Authorizing the
9 Employment and Compensation of Tiger Capital Group, LLC as
10 Liquidation Agent by Lauren Catherine Kiss on behalf of
11 Dowling College.

12
13 Hearing re: Adv. 16-08178-reg Zaikowski v. Dowling College
14 [13] ADJ Motion to Authorize/Direct a Class Certification
15 pursuant to Rule 23(b)(3) of the Federal Rules of Civil
16 Procedure, made applicable by Federal Rule of Bankruptcy
17 Procedure 7023, comprised of Plaintiff and all persons who
18 worked at or reported to a Facility of Defendant who were
19 terminated without cause on or about June 1, 2016 or within
20 30 days of that date by Jack A. Raisner on behalf of Lori
21 Zaikowski.

22
23
24
25 Transcribed by: Tracey Williams

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1 A P P E A R A N C E S : (Contd.)

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9 BY: RENE S. ROUPINIAN, ESQ. (TELEPHONIC)

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1 P R O C E E D I N G S

2 THE CLERK: Matters Nos. 56 through 67, Dowling
3 College.

4 (Pause)

5 THE CLERK: May I have appearances, please?

6 MR. SOUTHARD: Good afternoon, Your Honor, Sean
7 Southard of Klestadt Winters Jureller Southard & Stevens, on
8 behalf of Dowling College, debtor in possession.

9 MR. KLEINBERG: Good afternoon, Judge, Howard
10 Kleinberg, Meyer Suozzi, for the Dowling board members.

11 MR. WARMUTH: Good afternoon, Glenn Warmuth, Stim
12 & Warmuth, for Kimberly Poppiti.

13 MR. FRIEDMAN: Good afternoon, Your Honor, Ronald
14 Friedman from SilvermanAcampora, counsel to the Creditors
15 Committee, and I'll just step outside. I know Mr. Dimino
16 and Mr. McCord stepped outside, I'll get them.

17 THE COURT: Are they coming back or are --

18 MR. FRIEDMAN: Yes.

19 THE COURT: -- they beating each other up?

20 MR. BERKOWITZ: Good afternoon, Your Honor, Adam
21 Berkowitz of Garfunkel Wild on behalf of UMB. And I believe
22 that my colleague Ian Hammel of Mintz Levin is on the line.

23 THE CLERK: Please state your appearances.

24 MR. HAMMEL: Yes, good afternoon, Ian Hammel on
25 behalf of UMB. And thank you, Your Honor, for letting me

1 appear by phone.

2 MS. ROUPINIAN: Good afternoon, Your Honor, Rene
3 Roupinian and Jack Raisner of Outten & Golden, appearing on
4 behalf of Lori Zaikowski and the putative Warren class.

5 MR. SCOTT: Good afternoon, Your Honor, Brendon
6 Scott, Klestadt Winter Jureller Southard & Stevens,
7 appearing in the Warren adversary proceeding on behalf of
8 Dowling College.

9 MR. MCCORD: Good afternoon, Your Honor, Richard
10 McCord for ACA Financial Guaranty Corp.

11 MR. DIMINO: Good afternoon, Judge, Alfred Dimino
12 from the Office of the U.S. Trustee.

13 THE COURT: You're up.

14 MR. SOUTHARD: Thank you, Your Honor. Once again,
15 for the record, Sean Southard.

16 Your Honor, we have a number of matters on today's
17 calendar. We filed a proposed agenda at the end of last
18 week and, unless Your Honor prefers otherwise, I would
19 propose to follow that agenda.

20 THE COURT: Let's go with it.

21 MR. SOUTHARD: Very well. So the first matter on
22 the calendar is basically a continued status conference
23 relative to the case. And by way of update, Your Honor, we
24 continue to move towards a close on the Oakdale campus sale,
25 which Your Honor will remember we were before you last for

1 approval in connection with that 363 sale. We are engaged
2 with counsel and are putting together the relevant closing-
3 related documents and discussing matters with title.

4 In addition to those matters, we have over the
5 weekend reached agreement with the same proposed purchaser,
6 Princeton, who is buying the Oakdale campus, for the
7 furniture and equipment that are located at the Oakdale
8 campus. And we would envision coming before Your Honor with
9 a separate motion seeking that approval in the very near
10 future.

11 THE COURT: But you're not going to go forward on
12 that Tiger application?

13 MR. SOUTHARD: Well, Your Honor, we -- I will talk
14 to you about that when we get to that point or I can discuss
15 the thoughts now.

16 THE COURT: I should have made that as a statement
17 more than a question.

18 (Laughter)

19 MR. SOUTHARD: Very well. So there was
20 consideration about whether to withdraw that motion or not,
21 and the or not comes from the hypothetical situation where a
22 closing with Princeton does not occur for some reason and we
23 move to a back-up bidder, and the timing for removal of the
24 furniture and equipment in that scenario is somewhat
25 uncertain.

1 So as a result, what we had discussed with Tiger,
2 frankly, as recently as an hour or so ago, my client was in
3 discussions with a Tiger representative about their
4 willingness and flexibility to in essence stay in the back,
5 back-up situation and available to us, retained, but not
6 officially let to go forward with their services until a
7 date when we say go. And at that point and only at that
8 point would they become entitled to any sort of commission
9 or expense reimbursement compensation.

10 And I think as of just moments before they're
11 seemed to be a willingness to serve in that in essence back-
12 up situation, subject to some refinement on the terms in the
13 agreement and therefore when we -- what we were going to
14 propose to Your Honor, assuming that was an acceptable
15 situation, was that we would docket a revised form of
16 proposed agreement, making clear what the revisions were to
17 the proposed arrangement --

18 THE COURT: They'd have to tee that up again,
19 because that is one of the most -- I guess as you get older,
20 you see a lot of things, and I go all the way back and I'm
21 not sure I've ever seen an agreement like this, ever, at
22 least if somebody was -- never mind. So, no, I'm not
23 prepared to go ahead with that.

24 So you can restructure it, you can relook at it,
25 tee it up again or look at it again, but the agreement

1 that's in front of me I'm not prepared to sign, whether
2 there's objections or not.

3 MR. SOUTHARD: Okay. Well, I understand Your
4 Honor's comments and I think that makes it easy for us,
5 frankly. We will discuss the matter further with Tiger. If
6 Your Honor had any particular concerns that you would like
7 to share --

8 THE COURT: Well, the particular concern is they
9 are an auctioneer, they're putting up zero money, they're
10 going to do a function of an auctioneer, and for that they
11 get the greatest percent I've ever seen on a sale of a piece
12 of -- on goods.

13 MR. SOUTHARD: Well, Your Honor, on the --

14 THE COURT: Why would you give them anything more
15 than five percent?

16 MR. SOUTHARD: The expectation is that under
17 certain scenarios they are providing a guaranteed recovery
18 to the estate, but --

19 THE COURT: Well, I've seen that, but let them put
20 the guarantee in writing and how much money the floor is,
21 and then we'll evaluate it.

22 MR. SOUTHARD: And then -- and I understand Your
23 Honor's point -- and then in addition to that or as an
24 alternative to that, if the guarantee is not applicable,
25 what they are committing to do is in essence front the costs

1 and expenses of the marketing and the sale process and take
2 the risk that the sale proceeds do not realize enough to
3 cover those up-front costs.

4 THE COURT: The goods are all being -- are all at
5 Dowling, they're not being moved to a third place, are they?

6 MR. SOUTHARD: I'm sorry, Your Honor, I missed the
7 first part.

8 THE COURT: The furniture and fixtures are sitting
9 in the facility?

10 MR. SOUTHARD: They are, Your Honor.

11 THE COURT: These guys aren't picking them up and
12 moving them into New York City into a conference area like
13 with the Madoff goods.

14 MR. SOUTHARD: No, Your Honor.

15 THE COURT: That was a different kind of deal.
16 This is this furniture in a house they want, come in and buy
17 it. They're not redoing the furniture, they're not
18 reupholstering the furniture, they're not polishing the
19 silverware --

20 MR. SOUTHARD: No, they are not.

21 THE COURT: -- I don't know what they're doing.
22 They're doing exactly what an auctioneer does: get a high
23 price, I'll pay you a percentage and move on. Don't make it
24 too complicated.

25 MR. SOUTHARD: I understand your point, Your

1 Honor. We will discuss it with Tiger and the other creditor
2 representatives.

3 I think part of our challenge has been to find
4 someone who was willing to do the more standard arrangement
5 given the type of assets we have and the time frame that we
6 were talking about. But we can revisit our options and then
7 come back in front of Your Honor.

8 THE COURT: Okay. Let's move on.

9 MR. SOUTHARD: So, Your Honor, in addition to the
10 Oakdale campus and related furniture and equipment effort,
11 we are seeking today to retain the Farrell Fritz firm to
12 serve as special counsel to the debtor in relation to the
13 Brookhaven campus planning work that has begun and needs to
14 continue, ideally before that campus is marketed for sale.

15 And so what we are doing is once Farrell Fritz is
16 hopefully retained subject to Your Honor's consideration
17 today, Farrell Fritz and the debtor would then proceed with
18 that effort before the town of Brookhaven.

19 THE COURT: Yeah, there's no objections to that, I
20 gather?

21 MR. SOUTHARD: There is none, Your Honor.

22 THE COURT: I find in front of me nothing -- no
23 reason not to approve that, so we'll grant that.

24 MR. SOUTHARD: Thank you, Your Honor.

25 And the parties are essentially discussing the

1 best timing for marketing and disposition of that campus, in
2 part dependent upon the timing of the town and its
3 consideration of the planning requests that Dowling is
4 putting forth.

5 So in an ideal scenario we would get to a
6 conclusion on that sale process about the same time we might
7 confirm a plan and that leads me to my next development that
8 I wanted to bring to Your Honor's attention, which is
9 although I am not privy to the minutia, my understanding is
10 that the Official Committee of Unsecured Creditors and the
11 DIP lenders, slash, prepetition secured lenders have reached
12 terms on a proposed global case resolution, if you will,
13 that would also touch on and agree upon the final DIP terms,
14 DIP financing of both to date and for the balance of the
15 expected case conclusion, and in effect provide for a
16 recovery for unsecured creditors. And I think what I would
17 like to do, with Your Honor's permission, is let one of
18 those attorneys who's more directly involved fill Your Honor
19 in on that current status.

20 MR. FRIEDMAN: Thank you, Mr. Southard.

21 Again, for the record, Your Honor, Ronald Friedman
22 from SilvermanAcompora. I'm happy to report for the Court,
23 after extensive discussions with counsel for the DIP lenders
24 and prepetition secured creditors, that we have come to the
25 terms of an agreement, subject to documentation, of course,

1 which we're endeavoring to embark upon very quickly,
2 probably this week and into next, and we'll be able to get
3 something on file. It certainly contemplates an amended and
4 restated and final DIP that will bring us out through the
5 time of confirmation.

6 Some of the gating items for the timing provision,
7 as Mr. Southard mentioned, resonate from the Brookhaven
8 timing and having that marketing process underway we all
9 believe, at least from the business perspective, that it
10 would be best to go to the creditor body and solicit plan
11 acceptance as close to and simultaneously with the
12 Brookhaven sale approval process as possible. There are
13 just less variables to do it that way, less post-
14 confirmation governance issues to deal with unsecured
15 creditors and the whole slew of items that I'm sure Your
16 Honor can conceive of.

17 But long story short, we have an agreement,
18 subject to documentation obviously and certainly court
19 approval that will bring us through confirmation of a plan.
20 There's a guaranteed recovery to the general unsecured
21 creditors in the form of a waterfall, certain high-level
22 marks and the creditors taking less at certain points in
23 times.

24 THE COURT: Is there going to be an ability to
25 handle if there are Section 5 claims?

1 MR. FRIEDMAN: Those Section 5 claims are
2 segregated and carved out for the pursuit by the Committee
3 and certainly for the benefit of the estate, as well as any
4 other potential third party claims.

5 THE COURT: So there will be a surviving entity to
6 bring those claims?

7 MR. FRIEDMAN: Correct.

8 THE COURT: Okay. All right, good.

9 MR. FRIEDMAN: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. SOUTHARD: Thank you, Your Honor. Again, for
12 the record, Sean Southard. I believe that concludes from
13 our perspective the status update for the case and unless
14 Your Honor has any questions about those items --

15 THE COURT: I'm done. Is there anything else on
16 today?

17 (Laughter)

18 MR. SOUTHARD: Great. There are a few things,
19 Your Honor, a couple near and dear to the professionals'
20 hearts. And that brings us to my firm's fee application,
21 which is docketed at number 320 on the docket, that is the
22 application of Klestadt Winters Jureller Southard & Stevens
23 as general bankruptcy counsel to the debtor in possession
24 for a first interim allowance of compensation and
25 reimbursement of expenses for the period November 29th

1 through March 31st.

2 Your Honor, and I should also mention that there
3 are four, including my firm's debtor professional
4 applications on today, all first interims for the same
5 relevant period at the max. Some of those professionals
6 were retained during slightly later retention dates than the
7 petition date, but the same cutoff period. And then in
8 addition to those four, Committee counsel likewise had made
9 an application for the same first interim period.

10 Your Honor, the fee applications include the
11 information required by the Bankruptcy Code, the Bankruptcy
12 Rules, the U.S. Trustee's guidelines, including detailed
13 time records, and comply with the large case guidelines
14 where applicable.

15 Turning back then to my firm's application, Your
16 Honor, the fees requested in the fee statements that were
17 filed total \$524,093.75. The fees that are requested in the
18 application are slightly less, \$522,896.25, the difference
19 due to a voluntary write-off of approximately \$1200 --

20 THE COURT: I have to ask --

21 MR. SOUTHARD: Yes, Your Honor.

22 THE COURT: -- on a half-a-million-dollar fee app,
23 you voluntarily wrote off a thousand bucks? It was more
24 trouble to find it. What does that represent?

25 MR. SOUTHARD: Your Honor, it represents the time

1 that personnel in my office were involved in reviewing and
2 revising fee statements on a monthly basis, so the U.S.
3 Trustee's Office takes a view that --

4 THE COURT: All right.

5 MR. SOUTHARD: -- those are not properly
6 compensable.

7 THE COURT: No, I remember sitting in hearings
8 where there were million-dollar -- multi-million-dollar fee
9 apps and someone arguing about why they took a cab instead
10 of a subway, and could never figure out why we were having
11 this discussion, but --

12 MR. SOUTHARD: We did this so as not to have the
13 discussion before Your Honor.

14 THE COURT: It's fine with me.

15 MR. SOUTHARD: Your Honor, the expenses requested
16 in the application total \$9,239.82 --

17 THE COURT: This is an interim?

18 MR. SOUTHARD: Correct.

19 THE COURT: And there's a 20-percent holdback?

20 MR. SOUTHARD: There is a 20-percent holdback.

21 Your Honor will remember that you entered an interim
22 compensation order that provided for the standard 20-percent
23 holdback.

24 THE COURT: Yeah, I have no problem.

25 Mr. Dimino, you've looked at these?

1 MR. DIMINO: Judge, the U.S. Trustee has reviewed
2 -- assisted with the interim compensation order, we have no
3 objection, the interim compensation order will continue.
4 This basically blesses what has been paid under the interim
5 compensation order.

6 THE COURT: The Court will grant the motion.

7 MR. SOUTHARD: Thank you, Your Honor.

8 With regard to the next fee application of the
9 Smith & Downey firm, it is again their first interim fee
10 application. It's docketed at number 308 on the docket.
11 The fees requested in that application are \$8,516.25, no
12 expenses. Your Honor, Smith & Downey during the relevant
13 period has not yet received any payment, so that entire
14 amount would be due them.

15 THE COURT: There's no holdback on this one?

16 MR. SOUTHARD: Your Honor, they are subject to the
17 20-percent holdback, but they have not been paid any of the
18 80 percent to date.

19 THE COURT: I'm just asking. There is no holdback
20 on this application; are we supposed to have one or not?

21 MR. SOUTHARD: Yes, Your Honor. It's an interim
22 application.

23 THE COURT: Okay. So the fees requested are
24 8,516.25 and they will get 80 percent of that, correct?

25 MR. SOUTHARD: The order we would propose to

1 submit would reflect 80 percent of that.

2 THE COURT: Okay. With that, the Court will grant
3 the motion.

4 MR. SOUTHARD: Thank you, Your Honor.

5 The next motion, fee application is by the Eichen
6 & DiMeglio firm. They are accountants to the debtor in
7 possession. The fees requested in that application total
8 \$36,157 --

9 THE COURT: Subject to a holdback?

10 MR. SOUTHARD: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. SOUTHARD: They have been paid 80 percent to
13 date and so effectively they're in the same position as my
14 firm, that this is in effect blessing -- seeking an approval
15 of that which has already occurred --

16 THE COURT: Okay.

17 MR. SOUTHARD: -- by virtue of the interim comp.

18 THE COURT: The Court will grant the motion.

19 MR. SOUTHARD: Thank you, Your Honor.

20 And then finally as far of the debtor's
21 professionals, the application of FPM Group, LTD, which is
22 at docket number 310. They are the consultants retained by
23 the debtor in possession relative to the Brookhaven campus
24 planning work that has taken place with the Town of
25 Brookhaven, which I spoke of a few moments ago. The fees

1 requested in that application total \$28,843.27, expenses of
2 \$12,846.12 --

3 THE COURT: Why are the expenses so high?

4 MR. SOUTHARD: Your Honor, the certain
5 subcontractor fees that FPM is utilizing that are part of
6 those expenses, this is a subject that we had some
7 discussion of at the retention phase --

8 THE COURT: Oh, these are the people they
9 retained?

10 MR. SOUTHARD: Correct, Your Honor.

11 THE COURT: And they're showing that as an
12 expense?

13 MR. SOUTHARD: Correct, Your Honor.

14 THE COURT: All right.

15 MR. SOUTHARD: Again, no objections, 80-percent
16 rule with regard to the fees, and we would ask that they be
17 approved.

18 THE COURT: The Court will grant the motion.

19 MR. SOUTHARD: Thank you, Your Honor.

20 Your Honor, I will cede the podium momentarily to
21 the SilvermanAcampora firm.

22 MR. FRIEDMAN: Good afternoon again, Your Honor,
23 Ronald Friedman for the Committee.

24 SilvermanAcampora's first interim application
25 covers the same time period of our retention through March

1 31. The amount of compensation sought was \$205,992.50, the
2 expense reimbursement was \$242.35. I know that my partner
3 Mr. Silverman had a discussion with Mr. Yang, I believe that
4 Mr. Yang had some concerns about some of the time entries,
5 and there was a voluntary reduction agreed to between Mr.
6 Silverman and Mr. Yang in the sum of \$11,000. Certainly Mr.
7 Dimino and I can confirm that for the record. And with that
8 having been said --

9 THE COURT: So this represents the agreed-upon
10 number or it's going to be 11,000 less than this?

11 MR. FRIEDMAN: It will be 11,000 less than the
12 205.

13 MR. DIMINO: Judge, the United States Trustee
14 doesn't have any objection. What I think we'll do is adjust
15 the amount at the end of the day when we do the -- because
16 they've been getting paid the 80 percent on what they've
17 billed and we'll just adjust that going forward, either at
18 the end on the final or at some time.

19 THE COURT: Okay. The Court will grant the
20 motion.

21 MR. FRIEDMAN: Thank you, Your Honor. Thank you,
22 Mr. Dimino.

23 MR. SOUTHARD: Your Honor, again for the record,
24 Sean Southard.

25 The next item on the agenda this afternoon is the

1 debtor's motion for an order under Bankruptcy Rule 9019
2 authorizing and approving a settlement by and between the
3 debtor, the International Union of Operating Engineers Local
4 30, Gary Bishop and Justino Reyes.

5 Your Honor, this motion relates to two union
6 members, Gary Bishop and Justino Reyes, who are members of
7 the Local 30 union. They had worked at the Brookhaven
8 campus until on or about June 1st --

9 THE COURT: So this takes care of these two
10 people?

11 MR. SOUTHARD: It does, Your Honor.

12 THE COURT: Okay.

13 MR. SOUTHARD: it's a relatively small amount of
14 priority claims.

15 THE COURT: Not to them.

16 MR. SOUTHARD: No, Your Honor, not to them, but in
17 the scope of claims involved in this case.

18 THE COURT: There's no objections on this?

19 MR. SOUTHARD: No objections, Your Honor.

20 THE COURT: The Court will grant that motion.

21 MR. SOUTHARD: Thank you, Your Honor.

22 Your Honor, that brings us to the motion by the
23 debtor to approve the retention of Farrell Fritz as special
24 counsel to the debtor nunc pro tunc to March 28th --

25 THE COURT: I think I did that.

1 MR. SOUTHARD: I believe Your Honor mentioned that
2 you were inclined to approve that.

3 THE COURT: All right. I thought I did, but if I
4 didn't, the Court will grant that motion.

5 MR. SOUTHARD: Thank you, Your Honor.

6 Your Honor, the next motion then on the calendar
7 is Docket No. 316 and that is the debtor's motion for an
8 order approving and authorizing procedures for the
9 disposition of the debtor's records.

10 Your Honor, this motion is -- was filed to in
11 essence explain to the universe of case constituents and
12 parties in interest the kinds of records that the debtor has
13 and proposed disposition with respect to those categories.

14 THE COURT: All I want to know is that into the
15 future any person who is associated with Dowling who needs
16 the records of his educational history, grades, whatever
17 else, those records will be available; he or she can get
18 them.

19 MR. SOUTHARD: Yes, Your Honor. To be clear, and
20 we put a provision in the motion to try to make this clear
21 as well to those students who might be reading it and they
22 were served with it, and that is that there was an agreement
23 reached between Dowling and Long Island University in the
24 summer of last year that provided for Long Island University
25 to serve as the custodian of the student transcripts and

1 related grade records, and this motion in no way seeks to
2 disrupt that arrangement, which was --

3 THE COURT: But in simple terms, somebody who
4 graduated in X who now needs a transcript or he needs some
5 other record of his participation at the school will have
6 that?

7 MR. SOUTHARD: Yeah. It may not be located at
8 Dowling, all right, because it's now with Long Island
9 University, but my understanding is that those records, to
10 the extent they ever existed, are now with Long Island
11 University and available through their standard request.

12 THE COURT: The order that I ultimately sign is
13 going to bind LIU, Long Island University, that order will
14 cover them and require them to maintain these records.

15 MR. SOUTHARD: The order as it's currently written
16 does not --

17 THE COURT: I know.

18 MR. SOUTHARD: -- do that, Your Honor. There is
19 an agreement that -- a written agreement between Dowling and
20 Long Island University, which was in effect brokered by the
21 offices of New York State Department of Education --

22 THE COURT: Whatever it is --

23 MR. SOUTHARD: No, I just think this is helpful
24 background for Your Honor --

25 THE COURT: Okay.

1 MR. SOUTHARD: -- because one -- you know, the
2 State Education Department as part of its role as a
3 regulator in this space is very concerned about students
4 having access to their records, former students, alumni and
5 the like, in perpetuity, and that was the reason why when
6 Dowling announced that it was to close one of the first
7 things that was taken care of with the assistance of State
8 Education was to find a custodian for the long term to make
9 those records available to students.

10 So that was done, this motion does not seek to
11 disrupt that. And indeed we -- one of the comments that we
12 worked through with State Education had to do with the
13 electronic records that are student-related records stored
14 on what's called the Banner System. The Banner System was
15 Dowling's repository for a lot of information. And what we
16 are proposing to do by virtue of this motion, what Dowling
17 is proposing to do is maintain that Banner System in a live
18 format up until 18 months after a confirmation is effective,
19 and thereafter to store backup tapes, which are
20 automatically generated of that Banner System, for five
21 years.

22 And at the conclusion of that five-year period,
23 what we've agreed to do with State Education is make
24 available to them copies of those backup tapes that they
25 would have available in perpetuity, presumably, and/or

1 destroy them, but only after notice to State Ed.

2 THE COURT: Okay. Again, I'll review the order,
3 but I want to make sure that the alumni, transfers, people
4 who attended, countless folks who borrowed money, kids, can
5 have a record, will have a record just as if the school was
6 still operating. And while they may seek it from LIU, I
7 just want to make sure that everybody has acknowledged the
8 needs for these records and the fact that the State may be
9 happy with something, that's fine.

10 So I think it will be okay, but I'm very concerned
11 about that.

12 MR. SOUTHARD: And the only thing I'm concerned
13 about, Your Honor, is the idea of trying to without notice
14 of that intention put any additional obligations on --

15 THE COURT: I'm not going to put any additional
16 obligations --

17 MR. SOUTHARD: -- LIU.

18 THE COURT: -- other than what you have in the
19 agreement.

20 MR. SOUTHARD: I think that's fine, Your Honor.

21 THE COURT: All right.

22 MR. SOUTHARD: We intended to make clear that this
23 relief would not alter that arrangement.

24 THE COURT: All right. And do we have a copy of
25 the State's agreement that preceded the bankruptcy or

1 whenever that was?

2 MR. SOUTHARD: The articulation agreement between
3 LIU --

4 THE COURT: Right.

5 MR. SOUTHARD: -- and Dowling?

6 THE COURT: Right.

7 MR. SOUTHARD: You do not have a copy.

8 THE COURT: Can you get us one?

9 MR. SOUTHARD: I can.

10 THE COURT: Okay.

11 MR. SOUTHARD: I can. That was not part of the
12 record to date.

13 THE COURT: I would like to see it, though.

14 (Pause)

15 MR. SOUTHARD: Your Honor, the other party who
16 expressed a potential objection informally to us was Cigna,
17 who is the debtor's third party administrator in relation to
18 the health care plan. So we have proposed some specific
19 language to address their concerns, which had to do
20 primarily with employees and their claims in relation to
21 health care benefits and in essence carving those out.

22 THE COURT: Cigna is just the processor, correct?

23 MR. SOUTHARD: They do provide certain stop-loss
24 coverage, but in effect they are just a processor. I don't
25 believe that the stop-loss has kicked in or will kick in

1 under the terms of the agreement, but I think they're
2 concerned -- they have filed a claim against the debtor and
3 certain of it is unliquidated.

4 THE COURT: Don't we have a bunch of people who
5 worked who claim that they paid into a health insurance
6 plan, the monies are not there now to satisfy their health
7 needs, health care needs, and is anybody covering that?

8 MR. SOUTHARD: Your Honor, I think we have
9 claimants who have asserted that they have paid in their
10 portion of premiums and that coverage was not provided by
11 Dowling on this self-insured plan, notwithstanding their
12 payment of their portion of the premiums, and I think that's
13 a result of Dowling's being unable to pay its large -- much
14 larger portion of the premiums due and the coverage here
15 that's necessary.

16 So are those claims being satisfied? It's a
17 complicated answer to that question. I think that at least
18 some of those claims and possibly all of them will be
19 satisfied --

20 THE COURT: Well, Dowling set up a self-insured
21 plan, correct?

22 MR. SOUTHARD: That's correct.

23 THE COURT: And I assume -- I don't know why I
24 assume this, but the government has certain standards by
25 which you can do that. I mean, the average person can't say

1 we're self-insured, pay me the premiums, and then not do
2 anything. I assume there are government regulations you
3 have to -- and there are filings on a regular basis that say
4 you're meeting those obligations, I'm guessing.

5 MR. SOUTHARD: Yes, Your Honor. I believe the
6 plan is covered by ERISA, or at least it's asserted to be
7 covered by ERISA, and the U.S. Department of Labor prior to
8 the petition date opened an investigation based upon the
9 complaints that it received in relation to the termination
10 of that plan.

11 THE COURT: And what is going on with that?

12 MR. SOUTHARD: It has filed, the Department of
13 Labor has also filed a claim ostensibly on behalf of all the
14 affected employees in the bankruptcy case. We have had
15 discussions with the U.S. Department of Labor about those
16 claims and information that it seeks. Cigna also received a
17 subpoena from the U.S. Department of Labor --

18 THE COURT: That is not part of the class action
19 that we're going to be dealing with or it is?

20 MR. SOUTHARD: It is not part of the class action,
21 Your Honor.

22 THE COURT: All right. We're going to have to --

23 MR. SOUTHARD: There's a --

24 THE COURT: -- either Mr. Friedman or somebody
25 here is going to have to before the end of this, the lights

1 go out on this, explain to me what happened to the money
2 that was collected from these folks as commission --
3 commissions --

4 MR. FRIEDMAN: Payroll reductions, payroll
5 reductions.

6 THE COURT: -- the payments and whether when they
7 were being collected the responsible parties, what they knew
8 or didn't know.

9 MR. SOUTHARD: Yes, Your Honor, I think we'll be
10 able to tell you that and others will also expect that from
11 us, including the Department of Labor. So we are indeed
12 working on analyzing the priority claims for these type of
13 claims and others related to compensation. There is a good
14 deal of overlap between different claimants' claims that
15 were filed. Both individual claimants may assert
16 entitlement and --

17 THE COURT: All right.

18 MR. SOUTHARD: -- then you have the Department of
19 Labor who asserts a similar entitlement, you have the Warren
20 Act that is also existing that overlaps in many instances
21 with some of these claims, at least at a priority --

22 THE COURT: So are these folks insured today or
23 not?

24 MR. SOUTHARD: They are not, Your Honor. Well,
25 they -- I should say, they are not insured by virtue of

1 Dowling's terminated plan; they may otherwise be insured.

2 THE COURT: Okay, all right.

3 MR. SOUTHARD: So, Your Honor, that was the other
4 modification --

5 THE COURT: Yeah, subject to review of the order,
6 I'll grant that motion.

7 MR. SOUTHARD: Thank you, Your Honor.

8 Your Honor, that brings us then to the debtor's
9 motion for continued debtor in possession financing.

10 THE COURT: Well, we also have the class action.

11 MR. SOUTHARD: Yes, Your Honor. I have --

12 THE COURT: I'll take it in any order you want.

13 Do you want to do that last?

14 MR. SOUTHARD: I apologize if I jumped over that.
15 Well, Your Honor, we can certainly take up the class action
16 now.

17 Your Honor, on the calendar today was the
18 plaintiff's motion seeking class certification, and the
19 debtor and the class representative have been able to
20 negotiate a consent order, a form of which was submitted to
21 chambers I believe last week. In essence, that approves the
22 class definition, certifies the class, and then approves the
23 appointment of the class representative and class counsel,
24 and a form of notice to then be delivered to the putative
25 class members.

1 THE COURT: Are proposed counsel on the phone?

2 MS. ROUPINIAN: Good afternoon, Your Honor, again,
3 Rene Roupinian and Jack Raisner of Outten & Golden on behalf
4 of the putative class.

5 THE COURT: Could you just do me a favor and
6 quickly go through the three or four elements that you
7 believe satisfy what this Court has to find in order to
8 certify the class?

9 MR. RAISNER: Your Honor, the elements that need
10 to be satisfied are under Civil Procedure Rule 23,
11 Bankruptcy Rule of Procedure 7023. There are four criteria
12 of 23(a), which is that the class has a commonality with the
13 class representative as to the major issues that need to be
14 resolved; the second is that the class representative is
15 typical of the other class members; the third is that she is
16 going to be an adequate representative; and of course we
17 have the numerosity, the number at least of 40 or more class
18 members, that is the (indiscernible) there are far more than
19 that.

20 There are two other questions that are under Rule
21 23(b)(3), which is the class that we're seeking, which is
22 what's called an opt-out class. And there are two criteria;
23 one, that this is a superior result than would otherwise be
24 the case and, therefore, that this is a fair, adequate and
25 reasonable settlement.

1 And the -- I think there isn't a question that we
2 meet the criteria on all of those counts within who the
3 class representative is Lori Zaikowski. I think Your Honor
4 may have gained some familiarity with her role as the union
5 president for many of the faculty groups. And so I don't
6 know if Your Honor would like to go down the elements --

7 THE COURT: No, that's sufficient. I had the luck
8 of actually having a class action out here before, so I'm
9 familiar with it. So we have -- I think she represents the
10 class, she is an adequate representative of the class;
11 numerosity, as you say, is above the 40; commonality of
12 interest is it's basically a Warnack claim in this class
13 action; geographically, they're all within a reasonable
14 area.

15 I know you are proposed counsel. From what I've
16 read, your firm is certainly experienced in this area.
17 There is no opposition from any party, including the
18 plaintiff, including the debtor, the U.S.T.'s office. So
19 the Court will grant that class certification.

20 MR. RAISNER: Thank you, Your Honor.

21 MR. SOUTHARD: Your Honor, just to complete the
22 record on this matter, we have commenced informal discovery
23 and the plaintiff made a request for production of certain
24 information and documents, and we are working on providing
25 as much of those requested items as we are able. It's our

1 belief that sharing this kind of information at this point
2 in time will help the parties try to reach resolution --

3 THE COURT: One of the complexities of this is the
4 Creditors Committee relationship to the class, can -- it's
5 interesting, put it that way. So there has to be some -- I
6 don't use coordination in a pejorative sense, but at least
7 some conversation so that parties don't do multiple
8 investigations of the same issue.

9 MR. SOUTHARD: Yes, Your Honor. We -- the debtor
10 is quite cognizant of that dynamic and have been careful to
11 make sure that the information shared with the Committee to
12 the extent sensitive is limited to Committee counsel and
13 indeed, if hypersensitive, not even shared with the
14 Committee counsel. But we have not had a situation such as
15 that yet in this matter. I think at the end of the day the
16 information that we are sharing --

17 THE COURT: What you need to be clear about is
18 when the Committee believes it has an agreement with parties
19 who are also parties to a class action, there needs to be
20 some recognition of the issues and resolution so that we
21 just don't go down a whole path and end up at a place that
22 doesn't get us anywhere. It's an easy way to -- I mean,
23 it's -- period.

24 MR. SOUTHARD: I think I understand Your Honor's
25 comments and, you know, at the -- at its core, what we're

1 trying to assess in relation to employee claims is the
2 extent of those claims and whether each has filled out the
3 relative priority bucket that's available to it under
4 507(a)(4) or (a)(5).

5 THE COURT: Whatever the issues are, even voting
6 in an ultimate plan, who does it, who's got the vote, if a
7 person didn't become part of the class and failed to file a
8 claim. There's a lot of case law these days I'm sure these
9 guys are well familiar with, leave aside the Supreme Court's
10 view where these class actions are going, but there is a lot
11 of law about -- and it all ends up with somebody falling
12 through the cracks. And since having read those cases, I
13 bring it up upfront. It doesn't mean we can avoid it all --
14 and it's easy for me, because I just put it on you all, not
15 me -- just be aware of it.

16 MR. SOUTHARD: I understand now what Your Honor is
17 referring to. I appreciate the reminder.

18 Your Honor, that then -- just to conclude this, we
19 under Your Honor's pretrial order entered in this adversary
20 proceeding previously now have an obligation to meet and
21 confer, and then exchange proposed candidates for a
22 mediation, a mediator that would lead a mediation process,
23 and we expect to exchange those proposed candidates this
24 week and hopefully reach an agreement on a proposed mediator
25 that we would then present to Your Honor in a proposed form

1 of order.

2 THE COURT: Okay. Class action -- all right, I've
3 got to go back and read what I did in the other case.

4 All right, that's I guess where we are. Do you
5 have a closing --

6 MR. SOUTHARD: I'm sorry, Your Honor, there's one
7 other item that we bounced over and that --

8 THE COURT: Tiger?

9 MR. SOUTHARD: -- was the DIP financing.

10 THE COURT: Oh.

11 MR. SOUTHARD: What the parties in light of the
12 pending agreement between the creditor constituencies, what
13 the debtor and with the support of those constituencies
14 would like to ask of Your Honor is to continue in effect the
15 interim approval for the balance of the DIP facility as it
16 currently exists, which would run through June 23rd. And we
17 would submit an additional four-week budget with a proposed
18 form of order --

19 THE COURT: When is our next hearing date?

20 MR. SOUTHARD: We don't have one yet, Your Honor.
21 What we will need to do is ideally get one in between now
22 and the 23rd, sometime during the week --

23 THE COURT: You can draft an order that permits
24 the extension of the DIP beyond that date with the consent
25 of the parties and the consent of the U.S.T. You don't have

1 to come in just for that, just put it in this order, like an
2 evergreen almost.

3 MR. SOUTHARD: I think we can confer on that, Your
4 Honor, and hopefully reach --

5 THE COURT: There's no purpose in me making you
6 guys come in here for nothing.

7 MR. SOUTHARD: I appreciate that. The only issue
8 would be that we will potentially be beyond the ultimate
9 authorization amounts that exist under the DIP, but --

10 THE COURT: You're going to have to cut that deal
11 anyway.

12 MR. SOUTHARD: Yes, Your Honor. We're happy to
13 take you up on that concept.

14 THE COURT: Yeah, to the extent you can work this
15 out and get the signoff of the U.S.T., then unless I find
16 something objectionable, I'm willing to do it in that
17 fashion. You can give notice of it if -- it's almost like
18 presentment, which I don't normally do, but there's no
19 reason to come out here for that.

20 MR. FRIEDMAN: Thank you, Your Honor.

21 MR. SOUTHARD: Thank you, Your Honor.

22 THE COURT: Now, do we have an expectation of a
23 closing date yet?

24 MR. SOUTHARD: I should know that better this
25 week, Your Honor. This coming Friday will be 30 days from

1 the date that Your Honor's order became final and we are in
2 discussions about what is a proper target date for that
3 closing, and I should know and have a better answer for you
4 later this week when we hear back from the purchaser --

5 THE COURT: All right, let chambers know when you
6 have a closing date --

7 MR. SOUTHARD: We will.

8 THE COURT: -- because normally when these things
9 close, when you go to the closing, somebody needs me to sign
10 something. Normally the title company, no matter what they
11 tell you, needs something else. It's an unblemished record
12 of that and I've never been able to figure it out.

13 MR. SOUTHARD: I hope that is not the case, Your
14 Honor, because we've spent --

15 THE COURT: Well, then you'll be the first.

16 MR. SOUTHARD: -- we've spent a good deal of time,
17 but I understand exactly what you mean.

18 THE COURT: Anyone want to bet on this one? You
19 could make money.

20 (Laughter)

21 MR. SOUTHARD: Not today.

22 THE COURT: All right, guys. Thank you. Thank
23 you all for your work.

24 (A chorus of thank you)

25 THE COURT: Have a good holiday weekend.

1 (Whereupon these proceedings were concluded at 2:46 PM)
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C E R T I F I C A T I O N

I, Tracey Williams, certify that the foregoing transcript is
a true and accurate record of the proceedings.

Tracey
Williams

Digitally signed by Tracey Williams
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Tracey Williams

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Date: June 19, 2017

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